Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

HAIM YUZARY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Can a defendant be tried for an offense under one subdivision of a statute, when: (a) prosecution of the defendant under a parallel subdivision of the same statute is barred under the test of *Blockburger v. United States*, 284 U.S. 299 (1932), reaffirmed by this Court in *United States v. Dixon*, 509 U.S. 688 (1993); and (b) Congress did not intend separate punishments for violations of both subdivisions arising from the same financial transaction.

LIST OF PARTIES

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Statement of the Case	4
Reasons for Granting the Writ	7
I. Prosecutors May Not Defeat The Fifth Amendment By Charging In A Successive Prosecution A Provision That Is Parallel To A Provision Barred By The Double Jeopardy Clause.	7
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Abney v. United States, 431 U.S. 651 (1977)	1

Contents

	Page
Blockburger v. United States, 284 U.S. 299 (1932)	i, 6, 7, 10
Brown v. Ohio, 432 U.S. 161 (1977)	6, 7
Green v. United States, 355 U.S. 184 (1957)	7
Schiro v. Farley, 510 U.S. 222 (1994)	8
United States v. Dixon, 509 U.S. 688 (1993)	i, 7, 9, 10
United States v. Holmes, 44 F.3d 1150 (2d Cir. 1995)	6, 8, 9
United States v. Ursery, __ U.S. __, 116 S. Ct. 2135 (1996)	9
United States v. Yuzary, 55 F.3d 47 (2d Cir. 1995)	5
Statutes Cited:	
18 U.S.C. § 371	5, 9
18 U.S.C. § 1001	4
18 U.S.C. § 1956	2, 8, 9
18 U.S.C. § 1956(a)(2)(B)	5
18 U.S.C. § 1956(a)(2)(B)(i)	6
18 U.S.C. § 1956(a)(2)(B)(ii)	5, 6

Contents

	Page
28 U.S.C. § 1254(1)	1
31 U.S.C. § 5316	3
31 U.S.C. § 5316(a)	4
31 U.S.C. § 5316(b)(4)	4
United States Constitution Cited:	
U.S. Const. Amend. V	1, 7, 9

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Second Circuit Filed May 8, 1997 .	1a
Appendix B — Opinion and Order of the United States District Court for the Southern District of New York Dated February 20, 1997	7a

The petitioner Haim Yuzary respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on May 8, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unpublished. It is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the United States District Court for the Southern District of New York (Patterson, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 7a, *infra*.

STATEMENT OF JURISDICTION

This criminal action was filed in the United States District Court on October 8, 1996. Petitioner's motion to dismiss the indictment on the basis of double jeopardy was granted in part on February 20, 1997.

On petitioner's interlocutory appeal, authorized by *Abney v. United States*, 431 U.S. 651 (1977), the Second Circuit entered a judgment and an opinion affirming the decision of the Southern District. *See* p. 1a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1956. Laundering of monetary instruments:

* * *

(a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States —

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part —

> (i) to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid transaction reporting requirements under Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. . . .

* * *

31 U.S.C. § 5316. Reports on exporting and importing monetary instruments:

> (a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent or bailee knowingly —
>
> > (1) transports, is about to transport, or has transported, monetary instruments or more than $10,000 at one time —
> >
> > > (A) from a place in the United States to or through a place outside the United States; or
> >
> > > (B) to a place in the United

States from or through a place outside the United States; or

(2) receives monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States.

* * *

STATEMENT OF THE CASE

Petitioner was arrested at Kennedy Airport in New York on November 7, 1991, as he was to board a flight to Panama. The arrest occurred immediately following petitioner's completion of a U.S. Customs form 4790 (Currency and Monetary Instrument Report) which reported that he was carrying approximately $30,000 in cash, and the discovery by Customs Inspectors that he was carrying approximately $480,000 in United States currency.

On July 14, 1992, indictment no. CR-92-794 was filed against petitioner in the United States District Court for the Eastern District of New York, charging him in two counts with violations of 31 U.S.C. § 5316(a) and 18 U.S.C. § 1001 ("the First Indictment").

Count one of the First Indictment charged "On or about November 7, 1991, within the Eastern District of New York, the defendant Haim Yuzary did knowingly and wilfully fail to file an accurate report as defined in Title 31, United States Code, Section 5316(b)(4), when knowingly transporting and being about to transport monetary instruments of more than Ten Thousand Dollars ($10,000) at one time, to wit, approximately $480,000 in United States currency, from a place in the United States to a place outside the United States."

Petitioner was convicted of both counts of the First Indictment and his conviction was affirmed, *United States v. Yuzary*, 55 F.3d 47 1995 (2d Cir. 1995).

The present indictment, in the Southern District (the "Second Indictment"), was filed on October 8, 1996. The Second Indictment charged petitioner in two counts with having conspired (under 18 U.S.C. § 371) to violate 18 U.S.C. § 1956(a)(2)(B), and with a substantive violation of § 1956(a)(2)(B).

The substantive count charged: "On or about November 7, 1991, in the Eastern District of New York, Haim Yuzary, the defendant, knowing that the monetary instruments and funds involved in the transportation represented the proceeds of some form of unlawful activity, unlawfully, wilfully, and knowingly attempted to transport, transmit and transfer monetary instruments and funds, namely, $480,000 in United States Currency, from a place in the United States, namely, Kennedy Airport in Queens, New York, to and through a place outside the United States, namely, Panama, knowing that such transportation was designed in whole and in part (i) to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity, namely, narcotics trafficking, and (ii) to avoid transaction reporting requirements under Federal law."

The District Court, on petitioner's motion, dismissed that portion of the substantive count of the Second Indictment that charged a violation of Section 1956(a)(2)(B)(ii), *i.e.*, the portion of the count that charged that respondent had acted "(ii) to avoid transaction reporting requirements under Federal law."

The elements of the substantive count of the Second Indictment included: (a) that respondent was attempting to

transport $480,000, "from a place in the United States . . . to and through a place outside the United States . . ." and (b) that he was seeking "to avoid transaction reporting requirements under Federal law."

The First Indictment had charged that he (a) "fail[ed] to file an accurate report as defined in Title 31, United States Code, Section 5316(b)(4)" [*i.e.*, "the transaction reporting requirement under Federal law"]; and (b) that he was transporting the $480,000 "from a place in the United States to a place outside the United States."

Under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), unless *each* statute requires proof of an additional element that the other does not, the Double Jeopardy Clause prohibits successive prosecutions. *Brown v. Ohio*, 432 U.S. 161, 164 (1977). It was thus evident that the portion of the indictment that charged a violation of Section 1956(a)(2)(B)(ii), was barred by the Double Jeopardy Clause, and the district court so held.

Nevertheless, the District Court permitted the portion of the count that charged a violation of § 1956(a)(2)(B)(i) to stand, since its elements were different from those of the earlier indictment. This result was affirmed by the Second Circuit, which similarly ignored the prong of the indictment that had been dismissed, noting that "Count II of the narrowed 1996 indictment thus does not violate double jeopardy." *See* p. 17a, *infra*.

Yet, the Second Circuit itself had recognized that both subdivisions were intended by Congress to comprehend a unitary offense respecting a given financial transaction, and that Congress did not intend separate punishments for violations of both subdivisions arising from the same financial transaction. *United States v. Holmes*, 44 F.3d 1150, 1155-56 (2d Cir. 1995).

On June 13, 1997, petitioner was convicted of both counts of the Second Indictment, and he is awaiting sentencing.

REASONS FOR GRANTING THE WRIT

I.

PROSECUTORS MAY NOT DEFEAT THE FIFTH AMENDMENT BY CHARGING IN A SUCCESSIVE PROSECUTION A PROVISION THAT IS PARALLEL TO A PROVISION BARRED BY THE DOUBLE JEOPARDY CLAUSE.

This writ should be granted because the decision by the Second Circuit has decided an important federal question that should be settled by this Court.

The Double Jeopardy Clause furnishes a vital protection: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ." *Green v. United States*, 355 U.S. 184, 187 (1957).

In *United States v. Dixon*, 509 U.S. 688 (1993), the Court reaffirmed the "same elements" double jeopardy analysis of *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977) and *Blockburger v. United States*, 284 U.S. 299, 304 (1932), with respect both to the multiple punishment and multiple prosecution contexts.

The decision below eviscerates the double jeopardy protections of the Constitution, and renders them hostage to the discretion of the executive branch of government. Criminal

statutes have become increasingly complex; the simple Biblical injunctions, such as "Thou shalt not steal," are now safeguarded by society with elaborate statutory frameworks that employ parallel verbs and clauses to foreclose alternative means of accomplishing essentially the same wrongdoing.

Section 1956 is a case in point. Subdivision (a) proscribes ten, often overlapping, separate courses of conduct that violate this provision. Yet, these subdivisions were intended by Congress to comprehend a unitary offense respecting a given financial transaction, and to allow but one punishment for violations of multiple subdivisions arising from the same financial transaction. *United States v. Holmes*, 44 F.3d 1150, 1155-56 (2d Cir. 1995).

Double jeopardy protections may no more be evaded by successive prosecutions than by duplicative accusations within the same instrument. *Schiro v. Farley*, 510 U.S. 222 (1994). Nevertheless, the government has done so here by the simple device of deft pleading:

The Second Indictment charged Yuzary with having acted:

> (i) "to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity; and"
>
> (ii) "to avoid transaction reporting requirements under Federal law."

The prong under subdivision (ii) was barred by double jeopardy; yet, the government was permitted to try petitioner under subdivision (i) because "Count II of the *narrowed* 1996 indictment . . . does not violate double jeopardy." (emphasis supplied). *See* p. 11a, *infra*. The substantive offense on which

the petitioner was tried under the Second Indictment is *literally* the "same offense," U.S. Const. Amend. V, for which he had already been tried and punished, and respecting which the Government suffered a double jeopardy dismissal in the district court.

The court of appeals' crimped, literal, interpretation of *United States v. Dixon* looms to undermine almost entirely the efficacy of the Fifth Amendment's protection against double jeopardy. No prosecutor, armed with the arsenal of clauses and verbs found in the federal code, need be concerned about the Double Jeopardy Clause. A prosecutor need only charge a parallel provision to come within the literal mandate of *United States v. Dixon* and evade the Constitution. The affront to the Constitution is highlighted here by the court of appeals recognition in *United States v. Holmes*, *supra*, that the multiple prosecutions and punishments[1] faced by the petitioner were not the intent of Congress.

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1. Petitioner's conviction of the conspiracy charge of the Second Indictment subjects him to a maximum of five years' incarceration, 18 U.S.C. § 371; his conviction under the substantive count subjects him to a maximum of 20 years' incarceration, 18 U.S.C. § 1956. Petitioner's conviction under the challenged substantive count *will* involve increased punishment because the Sentencing Guidelines provide for an offense score of between 26 and 31, depending upon the District Court's finding with respect to the amount of money involved as relevant conduct. At either extreme, the Sentencing Guidelines provide for more than 60 months' incarceration — the maximum allowable for the conspiracy of which petitioner was convicted under the Second Indictment.

While not directly relevant to the issues before this Court, it should be noted that sandwiched between the First and Second Indictments, the government commenced a civil *in rem* forfeiture proceeding, now pending in the Eastern District, as apparently authorized by *United States v. Ursery*, __ U.S. __, 116 S. Ct. 2135 (1966).

The question posed here for review is a vital one to the administration of justice in the United States:

Can a defendant be tried for an offense under one subdivision of a statute, when: (a) prosecution of the defendant under a parallel subdivision of the same statute is barred under the test of *Blockburger v. United States*, 284 U.S. 299 (1932), reaffirmed by this Court in *United States v. Dixon*, 509 U.S. 688 (1993); and (b) Congress did not intend separate punishments for violations of both subdivisions arising from the same financial transaction.

The "loophole" to the protection of *United States v. Dixon* that was exploited by the government in this case is nearly as large as the Constitutional protection itself. The resolution of the question raised in this petition warrants review by this Court.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MAY 8, 1997

[UNPUBLISHED]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESENT:

HON. GUIDO CALABRESI,
HON. ROGER J. MINER,
Circuit Judges,

HON. MILTON I. SHADUR,
*District Judge.**

97-1130

UNITED STATES OF AMERICA,
Appellee,

v.

HAIM YUZARY,
Defendant-Appellant.

ORDER

Appearing for Appellant: JACOB LAUFER, Halberstam & Karish, New York, N.Y. (Michael J. Halberstam, Steven E. Presberg, of counsel).

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* The Honorable Milton I. Shadur, Senior District Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

Appendix A

Appearing for Appellee: ROLAND G. RIOPELLE, Assistant United States Attorney, Southern District of New York, N.Y. (Mary Jo White, United States Attorney; Guy Petrillo, Assistant United States Attorney, of counsel).

UPON CONSIDERATION of this appeal from an order of the United States District Court for the Southern District of New York (Patterson, *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the order be and it hereby is AFFIRMED.

Haim Yuzary appeals from an order of the United States District Court for the Southern District of New York (Patterson, *J.*), entered on February 20, 1997, denying in part his motion to dismiss the present indictment on the grounds of double jeopardy and pre-indictment delay. We affirm the district court's decision.

On November 7, 1991, Yuzary was stopped by United States Customs Service officials at John F. Kennedy International Airport as he attempted to board a commercial airline flight to Panama. The officials informed Yuzary that he was required to complete Customs Service Form 4790 if he was transporting more than $10,000 out of the United States. Yuzary declared on the form that he was carrying $30,000. A subsequent pat-down frisk of Yuzary revealed that he had $180,000 in $100 bills on his person. His carry-on luggage contained an additional $300,000 in cash.

The first of two indictments was then filed in the Eastern District of New York ("1991 indictment"). Count I charged Yuzary with failure to file an accurate report with the United

States Customs authorities when knowingly transporting more than $10,000 from a place in the United States to a place outside the United States, in violation of 31 U.S.C. §§ 5316, 5322. Count II charged the defendant with knowingly and willfully making a false statement to the customs authorities, in violation of 18 U.S.C. § 1001. Following a jury trial, Yuzary was convicted of both counts and was sentenced to one year of probation on each count, to run concurrently, a $500 fine on each count, and a mandatory $100 assessment. This court affirmed. *United States v. Yuzary*, 55 F.3d 47 (2d Cir. 1995).

On June 3, 1996, the United States Attorney for the Eastern District of New York brought an *in rem* forfeiture action against the $480,000 seized from Yuzary. That action is currently pending.

On October 6, 1996, the government filed the instant indictment in the Southern District of New York ("1996 indictment"). This indictment was based on testimony of Isaac Mordoch obtained by the government subsequent to the 1991 indictment. This testimony led to evidence connecting the $480,000 with a money laundering scheme. Count I of the 1996 indictment charged the defendant with conspiring to violate the money laundering laws of the United States, in violation of 18 U.S.C. § 371. Count II of the indictment charged Yuzary with attempting to transport funds he knew were the proceeds of unlawful activity out of the country, while knowing that such transportation was "designed in whole and in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under . . . Federal law," in violation of 18 U.S.C. § 1956(a)(2)(B)(i)-(ii).

In pre-trial motions, Yuzary moved the district court to

dismiss the 1996 indictment on the grounds of pre-indictment delay and double jeopardy. To support the double jeopardy claim, which is the only issue presented in this interlocutory appeal, Yuzary cited the 1991 indictment and the civil forfeiture action. The district court held that Count I of the 1996 indictment was not barred on double jeopardy grounds, but found that Count II of the 1996 indictment was barred insofar as it alleged a violation of § 1956(a)(2)(B)(ii), that is, knowingly transporting laundered money outside the United States to avoid federal reporting requirements. The effect of the district court's ruling was to narrow the Count II of the 1996 indictment so that it only alleged a violation of § 1956(a)(2)(B)(i), that is, knowingly transporting laundered money outside the United States to conceal the ownership and control of that money.

On appeal, Yuzary maintains (1) that Count II of the 1996 indictment, even as narrowed by the district court, violates double jeopardy, and (2) that the entire 1996 indictment should be dismissed as violating the principles underlying double jeopardy, due process, and fundamental fairness.

The district court correctly noted that the defendant's double jeopardy claim is governed by the "same-elements" test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "That test inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' . . . and double jeopardy bars subsequent punishment or prosecution." *United States v. Dixon*, 509 U.S. 688, 688 (1993). The defendant must therefore show that Count II of the narrowed 1996 indictment failed the "same-elements" test relative to either count of the 1991 indictment.[2]

2. Defendant's protestations to the contrary notwithstanding, the double jeopardy claim only applies to the charges in the two indictments, and not to

(Cont'd)

Appendix A

As narrowed by the district court, Count II of the 1996 indictment requires (1) an attempt (2) to transport funds outside the United States (3) knowing that such funds represent the proceeds of some form of unlawful activity, and (4) knowing that such transportation is designed to conceal the nature, location, source, and ownership or control of the proceeds of (5) specified unlawful activity. *See* 18 U.S.C. § 1956(a)(2)(B)(i). Count I of the 1991 indictment required proof of a willful failure to file an accurate Form 4790, *see* 31 U.S.C. §§ 5316, 5322, while Count II of the 1991 indictment required proof of (1) a material false statement, (2) made knowingly and willfully, and (3) within the jurisdiction of a federal agency, *see* 18 U.S.C. § 1001.

A comparison of the two indictments shows that Count II of the 1996 indictment, as narrowed by the district court, passes the *Blockburger* test. That count contains elements — such as the defendant's knowledge that the funds were the proceeds of some form of unlawful activity — not contained in either Count I or Count II of the 1991 indictment. Similarly, Count I of the 1991 indictment required proof of the filing of a false form, which is not required by Count II of the narrowed 1996 indictment, and Count II of the 1991 indictment required the making of a false statement to a Customs Inspector, which is also not an element of Count II of the narrowed 1996 indictment. Count II of the narrowed 1996 indictment thus does not violate double jeopardy. *Compare United States v. Jackson*, 983 F.2d 757, 769 (7th Cir. 1993) (holding, on legislative intent grounds, that double jeopardy was not violated where defendant was prosecuted under both 18 U.S.C § 1956 and 31 U.S.C. § 5324, which imposes reporting requirements).

(Cont'd)
the civil forfeiture action. Civil forfeiture actions are "neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." *United States v. Ursery*, 116 S. Ct. 2135, 2149 (1996).

Appendix A

The defendant in the alternative asks us to find that the entire 1996 indictment violates the principles underlying double jeopardy, due process, and fundamental fairness. In making his more general double jeopardy argument, the defendant does not contest the correct ruling of the district court that Count I of the 1996 indictment passes the *Blockburger* test, nor does he revisit his argument that Count II of the narrowed 1996 indictment fails that test. Rather, he asks us to modify the "same-elements" test to make it more consonant with his interpretation of the Fifth Amendment. This we cannot do.

The defendant's due process and fundamental fairness arguments appear to rest on the fact that he has been subjected to prolonged litigation, which could have been curtailed if all the charges had been brought at once. But the defendant does not contest that the government lacked the evidence needed to charge Yuzary with money laundering before 1995-96, when it obtained the testimony of Mordoch. And while the defendant claims that the government was dilatory in obtaining this testimony, this speaks to Yuzary's claim of pre-indictment delay, which is not appealable before trial.

We have considered all of Yuzary's claims and find them to be without merit. The district court's order is therefore affirmed.

s/ Roger J. Miner
Hon. Roger J. Miner

s/ Guido Calabresi
Hon. Guido Calabresi
Circuit Judges,

s/ Milton I. Shadur
Milton I. Shadur
District Judge.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 20, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Cr. 967 (RPP)

UNITED STATES

-v-

HAIM YUZARY,

Defendant.

OPINION AND ORDER

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Appendix B

ROBERT P. PATTERSON, JR., U.S.D.J.

Defendant moves to dismiss the indictment on the grounds he had previously been indicted on the same grounds (double jeopardy) and on the grounds of pre-indictment delay. He also asks for a bill of particulars containing the names of co-conspirators, the times and places of meetings alleged to have occurred in 1991, and the names of the participants in those meetings.

BACKGROUND

On November 7, 1991, defendant was arrested at Kennedy Airport. The indictment filed in the Eastern District of New York ("1991 Indictment") charged him (1) in Count I with failure to file an accurate report as defined in 31 U.S.C. § 5316(b)(4),with the United States Customs authorities, when knowingly transporting and being about to transport monetary instruments of more than $10,000 at one time, to wit approximately $480,000 in United States currency, from a place in the United States, to a place outside the United States, in violation of 31 U.S.C. §§ 5316(a), 5316(b), 5322(a) and 18 U.S.C. § 3551 *et seq.*; and (2) in Count II with knowingly and wilfully making a false, fictitious and fraudulent statement to the customs authorities, in that he stated that he was carrying approximately $30,000 when he knew he was actually carrying $480,000, in violation of 18 U.S.C. §§ 1001, 3551 *et seq.* Defendant was tried and convicted of these charges in 1993. (Affirmation of Jacob Lauffer, "Lauffer Aff" at ¶ 5.) A civil forfeiture action arising out of that prosecution is pending in the Eastern District.

On October 6, 1996, the government filed the instant indictment ("1996 Indictment") in the Southern District of New

York which charges, in Count I, a violation of 18 U.S.C. § 371, namely, conspiracy with unnamed co-conspirators from in or about October 1990 up to and including November 7, 1991 to violate the money laundering laws of the United States, 18 U.S.C. § 1956(a)(2)(B), by transporting, transmitting and transferring monetary instruments and funds from New York to Colón, Panama, knowing that such transportations were designed to conceal the nature, location, source, ownership and control of proceeds of narcotics trafficking and to avoid transaction reporting requirements under federal law. In Count II the instant indictment charges that the defendant, on or about November 7, 1991, knowingly attempted to transport, transmit and transfer $480,000 from Kennedy Airport to and through Panama, knowing that the monetary funds involved in the transportation represented the proceeds of some form of unlawful activity, and knowing that such transportation "was designed in whole and in part (1) to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity, namely, narcotics trafficking and (ii) to avoid transaction reporting requirements under Federal law", in violation of 18 U.S.C. § 1956(a)(2)(B).[1]

DISCUSSION

1. Double Jeopardy

Defendant's double jeopardy claim is governed by *Blockburger v. United States*, 284 U.S. 299 (1932) and *United States v. Dixon*, 113 S.Ct. 2849 (1993). The *Blockburger* test "inquires whether each offense contains an element not

1. At oral argument defendant waived any objections to venue for Count II of the 1996 indictment which the government concedes lies in the Eastern District. (Transcript of January 21, 1997 Oral Argument, "Tr." at 46.)

contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecutions." *United States v. Dixon*, 113 S.Ct. at 2856. The double jeopardy claims applies only to the charges in the two indictments, not the civil forfeiture action, as civil forfeiture actions are "neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." *United States v. Ursery*, 116 S.Ct. 2135, 2149 (1996).

Count I of the 1996 indictment, the conspiracy to engage in money laundering, does not present a double jeopardy problem with respect to Count I of the 1991 indictment (failure to file an accurate report under 31 U.S.C. § 5316(b)(4) when being about to knowingly transport more than $10,000 from a place inside the United States to a place outside the United States) or Count II of the 1991 indictment (making a false statement to a United States Customs officer). The conspiracy count requires proof (1) of the existence of a conspiracy to transport funds out of the United States which are proceeds of an unlawful activity, in order to conceal the unlawful origin or control of those proceeds or to avoid federal transaction reporting requirements; (2) that defendant was a member of the conspiracy; and (3) that an overt act in furtherance of the conspiracy was conducted by defendant. The conspiracy count requires proof of an agreement with another member of the conspiracy and proof that the purpose of the conspiracy was to transport proceeds of unlawful activity out of the United States. It does not require proof of failure to file a United States Customs Form 4790 accurately (1991 Indictment Count I) or proof that the defendant made a false statement to a customs officer (1991 Indictment Count II). It does not constitute double jeopardy with either count of the 1991 indictment. *See, e.g., U.S. v. Felix*, 503 U.S. 378, 389 (1992) ("[S]ubstantive crime and conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes".)

Appendix B

Count II of the 1996 indictment charges a violation of both subsections (i) and (ii) of § 1956(a)(2)(B). This statute makes it a crime to (1) knowingly attempt to transport monetary instruments from a place in the United States to a place outside the United States when (2) knowing that such monetary funds are proceeds of unlawful activity and (3) knowing that the transportation is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under state or federal law.

Defendant's conviction under Count II of the 1991 indictment did not require proof of the following elements of the crime charged in Count II of the 1996 indictment, namely, (1) proof of knowledge that the proceeds attempted to be transported were the proceeds of some form of unlawful activity or (2) proof of knowledge that the transportation was designed (i) to conceal the nature, location, source, ownership or control of the proceeds of narcotics trafficking or (ii) to avoid transaction reporting requirements under federal law. Instead, the conviction under Count II of the 1991 indictment required proof that defendant actually made a false, fictitious and fraudulent statement to a United States Customs office in a matter within the jurisdiction of the United States Customs Service, an element not required under 19 U.S.C. § 1956(a)(2)(B). Thus, Count II of the 1991 indictment and Count II of the 1996 indictment each contain an element of the crime charged not contained in the other count, and therefore both meet the *Blockburger* test.

Comparison of Count I of the 1991 indictment to Count II of the 1996 indictment raises a closer question. The elements of Count I of the 1991 indictment are: (1) knowingly and wilfully

failing to file an accurate statement under 31 U.S.C. 5316(b)(4) when (2) knowingly transporting or being about to transport monetary instruments of a value of at least $10,000 from a place in the United States to a place outside the United States.

Count II of the 1996 indictment contains two elements not present in Count I of the 1991 indictment, namely, proof that the monetary instruments or funds attempted to be transported to a place outside the United States were proceeds of unlawful activity, and proof that the defendant knew that the transportation was designed to conceal the source, ownership or control of the proceeds of specified unlawful activity, a defined term referencing crimes included in the definition of racketeering activity which includes narcotics trafficking. The remaining elements of Count II, namely, attempting to transport monetary instruments or funds outside the United States on or about November 7, 1991, and avoiding a transaction reporting requirement under federal law, are contained in Count I of the 1991 indictment. Accordingly, to the extent that § 1956(a)(2)(B)(ii) (avoiding a transaction reporting requirement) is charged, there does not appear to be any element in Count I of the 1991 indictment that is not an element in Count II of the 1996 indictment.

Blockburger requires that "each offense contains an element not contained in the other". *United States v. Dixon*, 113 S.Ct. at 2856. The government argues that Count II of the 1996 indictment survives this test because the proof and elements are different from those in the 1991 indictment. According to the government, the 1991 indictment addressed the false statement the defendant made on a customs form he filled out on November 7, 1991 stating he was carrying $30,000 as opposed to $480,000, while the 1996 indictment would also encompass the defendant's

alleged aid to unnamed Colombian co-conspirators in avoiding reporting requirements.[2] (Tr. at 35-37.) If any activity other than the failure to file an accurate form with customs is charged, the language of the 1996 indictment charging that the alleged money laundering occurred "[o]n or about November 7, 1991" leaves a narrow window of time in which to prove the defendant attempted to avoid the transaction reporting requirements of the Colombian co-conspirators.[3] If within a week of this opinion the government makes a detailed offer of proof of such activity by the defendant within the charged time period, the Court will reconsider its ruling. At this time, however, the government's argument that Count II of the 1996 indictment charges defendant with violating the money laundering laws in connection with the Colombian co-conspirators is not supported by the language of the indictment or the proof the government has offered, and Count II of the indictment is dismissed with leave to the government to file promptly a superseding indictment not containing a charge of a violation of § 1956(a)(2)(B)(ii). The government may still prove the filing of the customs form on or

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2. The A.U.S.A. distinguished the two charges at oral argument by asserting that the 1991 indictment required proof of "the filing of a false form" while the 1996 indictment "requires activity to avoid filing a proper form . . . [T]here is, to my mind, Judge, a difference between filing a false form and not filing the form you're required to." (Tr. at 37.) In fact, the 1991 indictment actually charges that defendant "did . . . fail to file an accurate form". The distinction made by the government is more one of words than substance, as to "fail to file an accurate form" under § 5316(b) is incorporated within "avoid[ing] a transaction reporting requirement under Federal law".

3. The parts of the indictment detailing the overt acts and means of the alleged conspiracy in this time period include no facts suggesting that the transportation of funds alleged in Count II of the 1996 indictment refers to any activity other than that involved in Count I of the 1991 indictment. (1996 Indictment Count I ¶¶ 3-4.)

about November 7, 1991 as evidence of defendant's knowledge that the funds were proceeds of unlawful activity.

The government refers to two district court cases in support of its argument that a violation of 31 U.S.C. §§ 5316, 5322(a) is not a lesser included offense of 18 U.S.C. § 1956(a)(2)(B). (Letter of A.U.S.A. Roland G. Riopelle to the Court of February 6, 1997.) The first case the government cites, *United States v. Sierra-Garcia*, 760 F.Supp. 252 (E.D.N.Y. 1991), is inapposite for the simple reason that there the court states that the disputed counts of the indictment "do not charge the defendants with violating § 1956(a)(2)(B)(ii)", and therefore the counts charging 31 U.S.C. §§ 5316(a) and (b) and 5322(b) do not charge a lesser included offense of the money laundering statute.[4] *Id.* at 257. The second case the government cites, *United States v. Ortiz*, 738 F.Supp. 1394 (S.D. Fla. 1990), does address the interplay of U.S.C. § 1956(a)(2)(B)(ii) and 31 U.S.C. §§ 5316 and 5322(a). In finding that the latter is not a lesser included offense of the former, and thus both can be charged in the same indictment, the court looked to 31 C.F.R. § 103.23, a regulation promulgated under the same Currency or Monetary Instruments reporting laws charged in the 1991 indictment, which states that "transport" in 31 U.S.C. § 5316 requires proof of "physical" transportation of funds, while the money laundering laws permit electronic transmission of funds. *Id.* at 1403. The indictments at issue in this case, however, do not deal with electronic transmission of funds and do not reference this regulation. Thus, the distinction made in *Ortiz* is not applicable under the facts of this case.

Accordingly, insofar as it charges a violation of

4. The money laundering charges in that case actually charges violations of § 1956(a)(1). *See United States v. Sierra-Garcia*, 760 F.Supp. at 255.

§ 1956(a)(2)(B)(ii), Count II of the instant indictment does not survive the double jeopardy test enunciated in *Blockburger*.

2. *Pre-Indictment Delay*

Defendant also bases its motion to dismiss on a claim that the government has unjustifiably delayed the 1996 indictment because it obtained no new information since the earlier prosecution which resulted in a conviction in 1993, and the lapse of time "has seriously crippled Yuzary's ability to present his defense and at the same time has also weakened his chances to succeed in his opposition to the forfeiture proceeding. . . ." (Defendant's Memorandum of Law, "Def. Mem." at 3.) Though the defendant cites cases enunciating the principle that unreasonable pre-indictment delay which prejudices a defendant violates due process, it has found no cases in which a court actually found that such a delay was unreasonable and prejudicial and thereby dismissed an indictment. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (rejecting claim that 18-month pre-indictment delay violated due process and finding "proof of prejudice is generally a necessary but not sufficient element of a due process claim and . . . [the due process inquiry] must consider the reasons for the delay as well as the prejudice to the accused"); *United States v. Marion*, 404 U.S. 307, 324 (1971) (finding that 38-month pre-indictment delay did not violate due process where defendant did not allege or prove actual prejudice and made no showing that government intentionally delayed to gain tactical advantage).

Here, while defendant has generally alleged prejudice, he has made no specific showing of how his rights to a fair trial have actually been prejudiced by the delay. Furthermore, the government has shown that it did obtain new information, as a

result of the cooperation of Isaac Mordoch, an alleged co-conspirator extradited from Panama in October 1995, who in November 1995 for the first time tied the defendant to the money laundering conspiracy, and that from the fall of 1995 to the summer of 1996 the government gathered documentary evidence and retrieved evidence from the files of the Eastern District to verify Mordoch's information. (Affirmation of Roland Riopelle, "Riopelle Aff." at ¶ 2.) Mordoch's decision in the fall of 1995 to cooperate with the government and the resulting assemblage of documents is sufficient explanation for the government's delay in filing the second indictment. Defendant has thus failed to meet his burden of showing a violation of due process since he has not shown the pre-indictment delay to be either prejudicial or unjustified. Defendant's motion for a dismissal of the indictment due to pre-indictment delay is denied.

3. Bill of Particulars

Finally defendant requests a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, providing more detailed information regarding the allegations in the conspiracy charge. After the filing of this motion, the government provided a list of names of all known co-conspirators. (Riopelle Aff. at ¶ 3.) The government further stated that it does not now have the names of defendant's other alleged co-conspirators or more specific information regarding the location of meetings alleged to have taken place in midtown Manhattan or the identities of the participants in those meetings. (*Id.*) If and when this information is obtained, it is to be turned over to defendant. As the information is not available at this time, defendant's request for a bill of particulars is denied.

Appendix B

CONCLUSION

Count II, the substantive count in the 1996 indictment, insofar as it alleges a violation of § 1956(a)(2)(B)(ii), is hereby dismissed as it violates double jeopardy in light of defendant's prior conviction under Count I of the 1991 indictment. The government has one week from the date of this opinion to make a detail offer of proof to support the arguments it made at oral argument distinguishing the charge of § 1956(a)(2)(B)(ii) in the 1996 indictment from Count I of the 1991 indictment.

The defendant's motions seeking dismissal of the entire indictment due to pre-indictment delay and a bill of particulars are denied.

IT IS SO ORDERED.

Dated: New York, New York
February 20, 1997

s/ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.